83-844

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JACK D. CHERUBINI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALAN SILBER
SILBER AND RUBIN, P.C.
177 Prince Street
New York, New York 10012
(212) 677-1004
Attorneys for Petitioner

JOSEPH A. HAYDEN, JR.
MERRILL N. RUBIN
Of Counsel

Questions Presented

1. Whether the intent of the Framers of the Constitution and Congress removes Petitioner's conduct from within the purview of 18 U.S.C. Sec. 1341.

2. Whether the "intangible rights" theory of mail fraud prosecution should be extended to petitioner, a non-office holder.

PARTIES

Jack D. Cherubini and the United States of America.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Jurisdictional Statement

The judgment of the Court of Appeals for the Third Circuit was entered on July 27, 1983. A petition for rehearing en banc was denied by order entered on October 14, 1983, and this petition for writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statute Involved

Title 18, United States Code, Section 1341, the Mail Fraud Statute, provides,

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious

article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter of thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Opinions Below

The oral opinion on the United States District Court for the District of New Jersey, Stern, J., is unreported and is reproduced in the Appendix hereto ("App.") at A. The judgment order of the United States Court of Appeals for the Third Circuit is reproduced at App. B. The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for a rehearing and rehearing en banc, unreported, is reproduced at App. C.

Statement of the Case

Jack D. Cherubini was indicted by a federal grand jury for the District of New Jersey on June 14, 1982. The eight-count indictment, charged petitioner with violation of 18 U.S.C. §§ 1341 and 2, thereby giving the District Court for the District of New Jersey jurisdiction over petitioner.

On April 7, 1981, a local school board election was held in Union City, New Jersey. No Federal or statewide contests were on the ballot. Prior to that election day, petitioner, a city construction official who speaks Spanish fluently, discussed the election with friends and acquaintances, a number of whom spoke only Spanish.

Petition believed certain of these people would be unable to vote during the limited hours polls were open, 2:00 p.m. to 9:00 p.m. Therefore, he asked

them if they wished to vote by absentee ballots.

A number of those voters that requested the absentee ballots, could not speak or read English. All absentee ballot materials, including the instructions, were printed only in English and had to be completed in accordance with complex instructions. Petitioner, knowing that voters found the instructions confusing, and that incorrectly marked ballots would be invalidated, helped complete nine ballots, at the voters' requests.

Each of the nine voters signed his or her name on the ballot and gave the ballot to Petitioner with explicit instructions to mark the ballot for the petitioner's candidate. At trial, each voter testified that the candidates for whom their votes were cast were the ones they wished to vote for, and that they

knew they were signing ballots for the school board election.

Each of the ballots was mailed to the Hudson County board of Elections, although they would have been accepted if they had been delivered by hand.

The government contended at trial that "fraud" arose from a violation of N.J. Stat. Ann. §19:57-17, which requires that a voter who casts an absentee ballot certify that the ballot was marked in secret.

Because of the mailings and the alleged fraud Cherubini was indicted by a Federal grand jury on eight counts of mail fraud on June 14, 1982.

Reasons For Granting the Writ

I. THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN EXTENDING THE APPLICATION OF THE MAIL FRAUD STATUTE BEYOND PREVIOUSLY RECOGNIZED BOUNDS

Never before - at least in any reported decision - has the Federal Mail Fraud Statute, 18 U.S.C. §1341, been employed in an area with such a tangential connection to legitimate Federal interests. Such an extension ignores the intent of the legislature and of the framers of the Constitution, and has impermissibly expanded the bounds of Federal criminal jurisdiction. If the decision stands, the already overburdened Federal courts will see an influx of cases with only minuscule connection to legitimate Federal concerns. Every area of human endeavor formerly subject to state criminal jurisidiction will become the subject of scrutiny by Federal prosecutors. This

is hardly the result foreseen by the framers of the Constitution.

Two centuries ago, Alexander Hamilton outlined the "proper extent" and "proper objects" of Federal jurisdiction. Hamilton, The Federalist No. 80. Most significant about Hamilton's discussion of the "proper objects" of Federal jurisdiction is what he omitted to discuss in any detail: Federal criminal jurisdiction. Hamilton believed that a Federal judicary was necessary primarily to enforce the constitutional restrictions on the States, such as the printing of money and the imposition of duties on imported items; controversies between states; and other civil matters of national import. Id. Hamilton did not anticipate the prosecution in Federal court of conduct with minuscule Federal interest.

In the case at bar, Petitioner was

convicted and sentenced under the Mail Fraud Act, 18 U.S.C. §1341, for conduct which clearly is of minuscule, if any, Federal interest. Petitioner's conviction arose out of the preparation of absentee ballots for a local school board election. The voters freely endorsed the ballots, which were filled in with Petitioner's assistance, and the ballots were then mailed to the local board of elections. Hand delivery of the ballots would have been permissible.

To convict appellant of the Federal felony of mail fraud, the prosecution must prove (1) that a scheme to defraud existed; and (2) that the mails were used to execute that scheme. United States v, Curry, 681 F.2d 406 (5th Cir. 1982) (Garwood, J., concurring). Here, the only "fraud" involved an alleged de minimus violation of New Jersey law.

The legislative history of §1341,

although scant, indicates that this conduct was not intended to be within its purview. Section 1341 was aimed at fraudulent conduct for which the mails were the direct vehicle for carrying out the fraud, and without which the fraud could not have been perpetrated. Such a situation does not exist here.

The predecessor to §1341 was Sec. 301 of the Act of June 8, 1872, which was designed to "prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870).

An 1899 amendment to Section 301 added specific prohibitions against counterfeiting schemes prevalent at the time. See, Comment, "The Intangible Rights Doctrine and Political Corruption

Prosecutions Under the Federal Mail Fraud Statute," 47 U. of Chi. L.R. 562, 568-69. A 1909 amendment, which was enacted without comment or debate, added a prohibition against "obtaining money by false pretenses." Act of March 4, 1909, Chap. 321, §215, 35 Stat. 1130. Comment, supra, at 570. Subsequent amendments, in 1948, 1949, and 1970, had little import, and mainly deleted obsolete language or eliminated surplusage. Id. at 572.

The congresses which enacted and amended the mail fraud statute never intended it to reach Petitioner's conduct. A judicial extension which would do so tortures §1341 beyond all recognition. To prosecute the petitioner in Federal court under a Federal statute for a purely local matter is an impermissible expansion of an already exploded Federal criminal

jurisdiction. As such, it is inherently unfair to the Petitioner, resulting in a felony prosecution for what is a crime of the fourth degree under state law.

This unfairness has been noted by courts and commentators alike. See Schwartz, "Federal Criminal Jurisdiction and Prosecutor's Discretion," 13 Law and Contemp. Prob. 64 (1948). See also, United States v. Curry, supra 681 F.2d at 421 (Garwood, J., concurring).

This expansive view of mail fraud prosecutions first arose in United States v. States, 488 F.2d 761 (8th Cir. 1973.), cert. den. 417 U.S. 909 (1974), in which it was held that a victim need only be defrauded of "intangible rights," for jurisdiction under §1341 to attach. The legislative history of §1341, however, gives no indication that prosecutions under this theory were ever intended.

One commentator concluded:

"By invoking a theory of intangible political rights, several Federal courts have attempted to convert the federal Mail Fraud Statute - section 1341 - into a weapon for fighting political corruption. The mere deprivation of the right to honest government, according to the intangible-rights theory, constitutes fraud for purposes of section 1341.

Analysis of the legislative history of section 1341, however, demonstrates that the section's reach should be limited to fraudulent conduct that results in the acquisition of money or property from the victim. The meaning of fraud in the nineteenth century, when the mail fraud statute was originally adopted, bolsters such a reading. Moreover, the Supreme Court and lower federal court decisions that have been cited for an intangible-rights construction of section 1341 do not provide support. The use of section 1341 against politically corrupt politicians thus remains contrary to Congress's original intent. Until Congress amends the section, such use should not receive the imprimatur of the courts."

Comment, supra, at 587.

Judge Garwood, concurring in Curry, supra rejected the States decision as

giving "an excessively broad reading" to Fifth Circuit decisions, and ignoring "the rule requiring strict construction of criminal statutes, especially where the subject matter involves conduct traditionally governed by local law enforcement." Curry, supra 681 F.2d at 420, n. 4. He further expressed concern that application of the mail fraud statute in Curry would make a felony out of conduct which was, at most, a misdemeanor under Louisiana law, noting that "[i]f some such limitation is not placed on §1341 it will reach virtually every knowing misrepresentation mailed with the intent to deceive." Id. at 421.

A close analogy can be drawn from the unanimous decision in Rewis v. United States, 401 U.S. 808 (1971). In Rewis, the Court reversed the convictions of two operators of a

Florida gambling establishment who were prosecuted under the Travel Act, 18 U.S.C. §1952, because bettors from Georgia crossed state lines to visit the establishment. Id. at 812, 813.

The Court held that

> "[g]iven the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships . . . [and] . . . would transform relatively minor state offenses into Federal felonies. . . . [N]either statutory language nor legislative history supports such a broad-ranging interpretation of §1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, Bell v. United States, 349 U.S. 81, 83, 99 L.Ed. 905, 910, 75 S.Ct. 620 (1955).

Rewis, supra, 401 V.S. at 812.

The Travel Act was aimed primarily

at organized crime, and more specifically, at persons who reside in one State while operating or managing illegal activities located in another. Rewis, supra, 401 U.S. at 811. Similarly, the Mail Fraud Statute, was aimed at city-dwelling swindlers using the mails to perpetrate fraudulent schemes against those living in rural areas. Cong. Globe, 41st Cong., 3d Sess. 35 (1870).

Just as an expansive reading of the Travel Act makes criminal activity, traditionally subject to state regulation, subject to Federal prosecution, so too does an expansive reading of the Mail Fraud Act. The within matter is a case where a relatively minor state offense is transformed into a federal felony.

Since the Eighth Circuit's decision is States, wherein the court held that

§1341 applies when citizens are defrauded of the intangible right to honest government, other Circuits have adopted this theory of mail fraud prosecutions. See, e.g., United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), cert. den. ___ U.S. ___ (1983), United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), cert. den., 445 U.S. 961 (1980); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) cert. den. 417 U.S. 976.

The States decision has been justly criticized as an impermissible expansion of the ambit of §1341, with commentators and courts positing that the meaning of the word "fraud" relates to money or property deprivations only. See, Comment, 47 U. of Chi. L.R., supra; Margiotta, supra, 688 F. 2d at 139-141 (Winter, J., dissneting as to the mail fraud count). See also, United States

v. McNeive, 536 F.2d 1245 (8th Cir. 1976); United States v. Curry, supra. These courts have agreed that not every breach of fiduciary duty works a criminal fraud. McNeive, supra, 536 F.2d at 1250.

Judge Ross, reluctantly concurring in States, stated

> "I cannot believe that it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime. The facts in this case show that this election fraud was purely a state matter. It should have been prosecuted in state court. The Assistant United States Attorney conceded in oral argument that the case was not the type of mail fraud case covered by written instructions contained in the United States Attorneys' manual. . . . [H]e relieved the state of its duty to police the violation of its local election laws and helped create a precedent which will encourage the same sort of unwarranted Federal preemption in the future."

States, supra, 488 F.2d at 767 (Emphasis

added).

The Petitioner submits that to uphold his conviction under 18 U.S.C. §1341 is to signal that the intangible rights theory of mail fraud prosecutions knows no bounds. The "rights" of which Petitioner was accused of depriving the voters of Union City are so intangible as to be ethereal. His actions, conducted with the whole-hearted assent of the absentee voters, are arguably not even fraudulent under New Jersey law.

Additionally, Petitioner owed no fiduciary duty to the people of Union City with respect to the conduct for which he was prosecuted. If he owed any duty at all, it was to the voters he assisted in preparing the absentee ballots. Yet the trial court found these votes had not been defrauded.

Although he was a construction official in Union City, Petitioner was

not performing his official duties when he assisted the absentee voters. Unlike the defendant in Margiotta, supra, he was not a powerful politician who effectively controlled all political and governmental activity within his sphere of influence. It was precisely because of Margiotta's extensive control of these activities and his widespread recognition as the "Boss," without whose approval the wheels of county government did not move, that Margiotta was found to have a fiduciary duty to the people of Nassau County. Margiotta, supra, 688 F.24 at 122.

The Margiotta Court concluded that "[t]here are limitations on the application of the mail fraud statute to violations of the intangible right to good government," but because Margiotta was the de facto head of Nassau County government, it held that §1341 reached

his conduct. Id.

The Margiotta Court's reasoning would not sustain Petitoner's conviction under §1341 because he neither had control over Union City government, nor was he acting in his official capacity with respect to the conduct which gave rise to his prosecution. Therefore, he owed no fiduciary duty to the voters of Union City.

The most recent judicial attempt to limit the scope of the mail fraud statute came on July 26, 1983. The trial court in United States v. Freedman, ___ F. Supp. ___, NO. 82 CR 840 (N.D. Ill. 1983) (Shadur, J.), dismissed an indictment on mail fraud charges brought against two attorneys who had solicited and obtained money from their client, which they represented would be used to bribe the judge hearing the clients" criminal

charges.

The significance of the Freedman decision to the case at bar is that the dismissal was based on the Court's analysis of Margiotta, supra. The reasoning directly parallels that of the Petitioner herein.

The trial court found that Margiotta represents the outermost reach of the [mail fraud] cases to the non-public official," and that Judge Kaufman's comments in Margiotta make it clear that Section 1341 was able to reach Margiotta on an "intangible rights" theory only because of his "stranglehold" over Nassau County, New York, government. Freedman, supra.

To permit Section 1341 to reach Petitioner's conduct would be to expand the intangible rights theory beyond all recognized bounds and create a precedent which will encourage the same sort of

unwarranted federal preemption in the future." States, supra, 488 F.2d at 767 (Ross, J., concurring), as well as deplete the resources of both the Courts and the Justice Department with petty cases, better left to the states.

One commentator recently noted that

> "Justice Cardozo observed that legal principles have a tendency to expand to the limits of their logic, and Judge Friendly has added the corollary that sometimes the expansionary momentum carries the principle even beyond those limits. So it has been with the recent growth in the federal mail fraud law, as courts have applied a standardized formula - known as the "intangible rights" doctrine - to a broad range of fact patterns having relatively little in common. The result has been both to extend the net of the federal criminal sanction over an extraordinarily vast terrain and to arm the federal prosecutor with a weapon substantially different in character from any previously known to the substantive criminal law."

Coffee, "The Metastasis of Mail Fraud: The Continuing Story of the

'Evolution' of a White-Collar Crime," 21 Am. Crim. L. Rev. 1 (1983).

The limits of such prosecutions have surely been exceeded in the case at bar.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

Alan Silber
Silber and Rubin, P.C.
New York, N.Y. 10012
(212) 677-1004

Attorneys for Petitioner

Joseph A. Hayden, Jr.
Merrill N. Rubin

Of Counsel

Dated: New York, N.Y.
November 18, 1983

APPENDIX

APPENDIX A

In The United States District Court For the District Of New Jersey

UNITED STATES OF AMERICA

-vs-

JACK D. CHERUBINI,

Defendant.

Criminal No. 82-196

TRANSCRIPT OF PROCEEDINGS
TRIAL TRANSCRIPT

Newark, New Jersey
October 20, 1982

BEFORE:
THE HONORABLE HERBERT J. STERN,
U.S.D.J.,
AND A JURY

Appearances:

W. HUNT DUMONT, United States Attorney,
BY: RICHARD L. FRIEDMAN,
Assistant United States Attorney,
For the Government.

GEORGE B. CAMPEN, ESQ.,
For the Defendant.

Reported by:

STANLEY B. RIZMAN, CSR
HOWARD A. RAPPAPORT, CSR
Official Court Reporters

The Court: There is no more need to reserve on that.

The motion is denied. If this were a case where the jury would have to conclude on the basis of the testimony that these voters were exercising their vote and their choice and all Mr. Cherubini was doing was helping them by filling out the forms for them at their direction and casting the votes as they independently determined they wanted to vote, then notwithstanding some technical violation of the New Jersey voting statutes, if there was one, this would not be a case of using the mails to defraud, for there would be no evidence from which a jury could find an attempt to defraud.

The evidence here, at least viewed in the light most favorable to the government, spells out an entirely different story. A jury may well find

from this evidence the majority of these voters expressed indifference to the election, without intending to vote in it at all. That most of them, according to their own testimony, voted in other elections personally when people like the President, the senator, the governor, congressmen were running. But they didn't care about this one.

What Mr. Cherubini did was to go among them, in some instances using perhaps a long standing personal relationship, in other instances went amongst strangers, in one instance using his official position, and instead got them to vote in an election they would not otherwise have voted in by, literally, doing everything that the voter would normally do except sign their names.

It is absurd on the state of this record to suggest that Mr. Nelson could

not have filled out and done all the things that Mr. Cherubini did. Mr. Nelson is obviously a sophisticated, prosperous businessman, with two buildings, two businesses, and from what I heard, a farm in Tennessee. Lord knows what else.

Nor is this a case where, even at the instance of Mr. Cherubini, reluctant voters were persuaded to cast the ballot of their choice. Each one of these people testified with the exception of one, and that was supplied by Mr. Cherubini, that they didn't care whether they voted or didn't vote or who their vote was cast for. And what they literally did was to bestow their vote upon Mr. Cherubini as they did, or maybe in the case of Mr. Acevedo, as a quid pro quo for his license.

They literally said to him: Here, Mr. Cherubini, have an extra vote on me.

You're a good fella. Or you got good sense. You know who to vote for. You do what you want.

In one instance Mr. Cherubini never even spoke to Mrs. Acevedo. As far as Mrs. Torres, she was a complete stranger to him. She wasn't even eligible to vote.

I agree with you. One theory of the government may not be applicable in the case of some of these voters: that is, he is charged with an intent to defraud them. I am persuaded that in many of these instances, aside from Mrs. Torres and aside from Mr. Acevedo, that these people wanted and were willing to give their votes away, that they were not being defrauded.

The trouble is they are not allowed to give their votes away. That Mr. Cherubini here well knew it.

But there is another aspect of the

indictment. And that aspect charges that not only were the individual voters defrauded of their votes, but all the rest of the electorate was defrauded by being deprived of a fair election in which Mr. Cherubini got one vote and one vote only, and that's the one he cast for Jack Cherubini.

He is only allowed to vote once. There can be no doubt that he knows that and there can be no doubt that everybody else in the world knows that. He may not use his official position nor his friendship nor advocacy nor anything else to cast more than one vote.

Just as those people did not say to him, Mr. Cherubini, go down to the polling place, vote for anybody you want, they could not convey to him their ballots and say, here, do what you want with them.

Motion denied.

I will only charge the jury on that theory of the case, however, Mr. Friedman, because I think that there is no evidence here from which the jury may find he defrauded these individuals. They knew what they were doing.

It is a sad, but nevertheless true truth that this precious right of citizenship they literally gave away, or maybe in one case sold. It's very sad to this Court to hear this testimony, because one of the duties of a federal judge on a monthly basis, or maybe more often, is to swear in new citizens.

Well, you have my ruling.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 82-5780

UNITED STATES OF AMERICA

v.

JACK D. CHERUBINI,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(Crim. No. 82-00196-01)
(Hon. Herbert J. Stern)

Submitted Under Third Circuit Rule 12(6)
July 21, 1983)

Before: ADAMS and HIGGINBOTHAM, Circuit Judges, and TEITELBAUM, District Judge*

JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that (1) the indictment does not state a crime because appellant's conduct is not within the reach of the Federal Mail Fraud Statute and thus his prosecution is an impermissible expansion of federal criminal jurisdiction; (2) the sentence imposed upon him, a sixty-seven year old first-offender who was not engaged in the alleged crimes for personal or pecuniary gain, was excessive under the circumstances; and (3) the court's charge to the jury with repect to the applicability of 18 U.S.C. § 1341 to the acts charged in the indictment constituted plain error, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

ATTEST:

SALLY MRVOS
Sally Mrvos, Clerk

DATED: July 27, 1983

* Hon. Hubert I. Teitelbaum, United States District Court for the Western district of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-5780

UNITED STATES OF AMERICA

v.

JACK D. CHERUBINI,
Appellant

(Crim. No. 82-00196-01)

SUR PETITION FOR REHEARING IN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and TEITELBAUM, District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in

the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,

ARLIN M. ADAMS
Circuit Judge

DATED: OCT 14, 1983

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*As to panel rehearing only.